Supreme Court, U.S.
FILED
NOV 26 1993
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No. 93-672

In The

Supreme Court of the United States

October Term, 1993

DEON L. THOMAS,

Petitioner,

v.

BRUCE PEARL, Individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

BONNIE J. CAMPBELL
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Second Floor
Hoover State Office Building
Des Moines, IA 50319

Counsel of Record

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the lower courts erred in granting the Respondent's Motion for Summary Judgment because the Petitioner failed to demonstrate a genuine issue of material fact on whether the Respondent violated 18 U.S.C. § 2511.

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STATUTES INVOLVED

18 U.S.C. § 2511 provides in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who –

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> * * *
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; * * *

shall be punished * * *

* * *

(2) * * * (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the

purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

STATEMENT OF THE CASE

The Petitioner, Deon Thomas, filed a complaint in Illinois state court in July, 1991 alleging that Respondent, Bruce Pearl, individually and in his representative capacity as assistant basketball coach of the University of Iowa, had violated 18 U.S.C. § 2511 by tape-recording a telephone conversation between Thomas and Pearl.

During the Spring of 1989, Thomas was a student at Simeon High School in Chicago, Illinois. Pearl was an assistant basketball coach at the University of Iowa in Iowa City, Iowa. During the Spring of 1989, Pearl contacted Thomas in an attempt to recruit Thomas to attend the University of Iowa on a basketball scholarship. In 1989, Pearl had frequent telephone conversations with Thomas and other high school athletes whom the coaching staff at the University of Iowa were interested in recruiting. These telephone contacts were usually initiated from Pearl's home in Iowa City, Iowa in the evening because the prospective recruits were involved in high school classes and school activities during normal working hours.

During these conversations, Thomas discussed recruiting contacts which he had received from other interested universities including the University of Illinois. Pearl believed that violations of National Collegiate Athletic Association (NCAA) rules might have occurred

in the recruitment of Thomas by the University of Illinois, and he was becoming concerned about rumors of allegations that the University of Iowa had violated NCAA rules in its recruitment of Petitioner. Pearl discussed his concerns with his superiors at the University of Iowa, including Bump Elliott, the Athletic Director; Fred Mimms, the Associate Athletic Director and NCAA compliance officer; and Tom Davis, the head coach. Prior to April 3, 1989, Fred Mimms provided Pearl with a Lanier tape recorder with a telephone attachment, to record statements of Thomas, his friends and family, to document their descriptions of recruiting activities.

Between April 3, 1989 and July 3, 1989 Pearl recorded eleven telephone conversations including one conversation with Thomas. During a conversation with Thomas on April 9, 1989, Pearl discussed the advantages of attending the University of Iowa, such as new facilities, a professional style system in the basketball program, a high graduation rate, getting away from home, and young teammates. Pearl also indicated that the University might be able to help with a good job. They also discussed the pressure of the recruiting process. The University of Iowa reimbursed Pearl for the expense of each of these telephone calls.

During June of 1989, Richard Hilliard, an enforcement officer of the NCAA, came to the University of Iowa and requested any information which the University possessed on the recruitment of Deon Thomas by the University of Illinois. NCAA bylaw, article 19.01.2 requires that representatives of a member institution must fully cooperate and make a full and complete disclosure of all relevant information requested by NCAA enforcement

staff. At the direction of head coach Tom Davis, Pearl played the tape-recorded conversations for Mr. Hilliard in Iowa City, Iowa. He also provided Hilliard with a copy of the memo dated May 5, 1989 which he had written to the athletic director of the University of Iowa, summarizing his knowledge of the recruitment of Thomas.

During August 1989, Richard Hilliard returned to the University of Iowa and requested the tape recordings. At the direction of head coach Tom Davis, Pearl provided the tape recording of telephone conversations to Mr. Hilliard in Iowa City, Iowa.

Only after the NCAA had initiated enforcement action against the University of Illinois for alleged violation of NCAA rules specifically on the recruitment of Thomas, Pearl played the tape recordings for Mike Slive, the attorney for the University of Illinois, at his request and as part of the NCAA enforcement action. The tape was played for Mr. Slive in Iowa City, Iowa. Pearl did not make or authorize any other disclosures of the tape recordings.

On April 6, 1992, Pearl filed a Motion for Summary Judgment, Statement of Undisputed Material Fact and Supporting Memorandum. On April 21, 1992, Thomas filed only a "Statement of Genuine Issues of Material Facts" but without any supporting affidavits or documentation. Thomas simply relied upon the allegations in the complaint.

On July 1, 1992, the district court granted the Motion for Summary Judgment on the ground Pearl acted "under color of law" because he had acted within the scope of his

employment as assistant basketball coach at the University of Iowa. The district court also found, in the alternative, that even if Pearl was not acting under color of law, his actions fell within the exception of 18 U.S.C. § 2511(2)(d). The Court found absolutely no evidence to conclude Pearl acted with the requisite purpose of committing any "criminal or tortious act in violation of the Constitution or laws of the United States or any state." Most importantly, Thomas did not cite *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990), nor encourage the district court to follow its holding.

Thomas appealed to the United States Court of Appeals for the Seventh Circuit on July 16, 1992. Once again, Thomas did not raise the *Stockler* decision or argue its holding in his Brief or Reply Brief. Additionally, Thomas did not urge the Seventh Circuit to modify or abandon its holding in *By-Prod Corp. v. Armen-Berry Co.* The Seventh Circuit held that Pearl did not come within the "under color of law" exception of 18 U.S.C. § 2511. The Seventh Circuit was unable to clearly define the meaning of "under color of law" but nevertheless held that it did not apply to Pearl. However, the court did find that the exception of 28 U.S.C. § 2511(2)(d) was applicable to Pearl's conduct. There was no genuine issue of fact or any evidence in the record to suggest an alleged "purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any state." The Seventh Circuit denied Thomas' motion for rehearing on July 30, 1993. Once again Thomas did not raise the holding in the *Stockler* decision nor did he request the court to reconsider its decision in *By-Prod Corp.* On this record, Thomas filed his Petition here.

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Writ of Certiorari. The asserted conflict between the circuits which Thomas attempts to use as a basis for granting certiorari was not raised nor preserved in the lower courts. Even if this Court finds that the issue was properly raised, the conflict between the circuits does not exist on whether 18 U.S.C. § 2510, *et seq.*, creates a privacy interest which would serve as a basis for denying the exemption of 18 U.S.C. § 2511(2)(d). Further, the lower courts properly analyzed the complaint in relation to the elements necessary to constitute tortious actions under state law. Thomas failed to adequately resist the motion for summary judgment because he did not present any evidence which would support his claims. Even if this Court could find that the lower courts had misinterpreted 18 U.S.C. § 2511(2)(d), Pearl came within the exemption of 18 U.S.C. § 2511(2)(c) because he was acting under color of law when he tape-recorded his conversation with Thomas.

REASONS FOR DENYING THE WRIT

WHETHER THE LOWER COURTS ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PETITIONER FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT ON WHETHER THE RESPONDENT VIOLATED 18 U.S.C. § 2511.

A. Thomas did not properly raise and preserve the issues.

Thomas seeks review of the Seventh Circuit decision because of an alleged conflict between the decision of the Seventh Circuit in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982) and the Sixth Circuit in *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990). Thomas has not properly preserved this issue. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Thomas did not request either of the lower courts to modify the holding of the Seventh Circuit in the *By-Prod Corp.* decision. Thomas did not argue that the Court should follow a different standard, and he did not cite to the *Stockler* decision by the Sixth Circuit. This issue is being raised for the first time before this Court. The Petition should be denied for this reason alone.

B. The Seventh Circuit correctly interpreted 18 U.S.C. § 2511(2)(d).

This Court has held that the Fourth Amendment does not create or protect a privacy interest which is infringed by the taping or monitoring of telephone conversations by a participant in the conversation. *Lopez v. United States*, 373 U.S. 427 (1963). The subsequent enactment of the

Federal Wiretapping Statute, (18 U.S.C. § 2510, *et seq.*), adheres to the holding of *Lopez* except for a very limited circumstance. The statute provides that taping of a telephone conversation by a participant who is acting "under color of law" does not constitute a violation. 18 U.S.C. § 2511(2)(c). It further provides that any participant who is not acting under color of law may tape-record the conversation unless the tape recording is made "for the purpose of committing any criminal or tortious act in violation of the Constitution or the laws of the United States or any state." 18 U.S.C. § 2511(2)(d). When these two sections are read together, it is clear that Congress intended to restrict the activities of a party to the conversation only to a limited degree.

Thomas' argument that the Seventh Circuit has misinterpreted the law by ignoring a privacy interest created by the statute is circular. He argues that the statute itself creates a privacy interest which is then tortiously invaded if a conversation is recorded without the consent of the other parties. This interpretation renders the intent portion of § 2511(2)(d) meaningless. This theory would subsume all the exceptions which are expressly contemplated by the statute. Otherwise stated, Thomas argues that the statute is violated unless all parties have consented to the tape recording of a phone conversation by a participant. The explicit language of the statute simply does not support such an interpretation.

Thomas' contention that the decision by the Seventh Circuit in *By-Prod Corp.*, 668 F.2d 956 (7th Cir. 1982), was incorrect for discussing each of the possible bases for

asserting unlawful action is misplaced. In order to determine whether a participant acted with a purpose to commit a criminal or tortious act, the court must view the challenged actions in light of the appropriate standard for the tort which was alleged. If the alleged actions of an individual would not at least support a cause of action for the underlying tortious or criminal act, it is very difficult to argue that the individual acted with a tortious or criminal intent. In fact, Thomas can find no support in the decision of the Sixth Circuit in *Stockler*, 893 F.2d at 856. In *Stockler*, as the federal statute directs, the Sixth Circuit expressly analyzed the requirements of the state blackmail statute to determine whether the undisputed facts would allow an inference to be drawn which would constitute blackmail under "the laws of . . . any state." *Stockler v. Garratt*, 893 F.2d 856, 859 (6th Cir. 1990). Had the issues been timely raised, the Seventh Circuit would have found no conflict between the Circuits. The Petition must be denied for this reason.

C. The lower courts correctly concluded that there was no genuine issue of material fact which precluded judgment for Pearl.

Thomas argues that the evidence was sufficient to demonstrate that Pearl intended to injure him in a tortious manner by placing him in a false light. This position cannot be supported by this record on summary judgment.

A Motion for Summary Judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment must inform the court of the basis for its motion and identify those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, which demonstrate the absence of a genuine issue of material fact. *Id.* at 324. A party resisting a motion for summary judgment may not merely rely upon his pleadings. *Id.* The non-moving party must by his own affidavits or by the depositions, answers to interrogatories and admissions on file identify specific facts showing that there is a genuine issue for trial. *Id.* In *Celotex*, this Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-323.

One of the principal purposes of the rules providing for summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Id.* at 322-324.

Thomas failed to resist the motion for summary judgment with specific facts, and with reference to discovery or affidavits. He merely relied upon the complaint which is wholly insufficient to generate a genuine issue of fact.

Thomas asks this Court to assume there is any evidence to support his allegation that the recording of the telephone conversation in question was false or that Pearl had any knowledge of such falsity. There is not even an affidavit by Thomas asserting that the statements in the telephone conversation were false or that the conversation somehow placed him in a false light. There is no evidence in the record which supports this contention. The absolutely undisputed facts are that Pearl was concerned about documenting statements made by Thomas his family and friends concerning the recruiting activities of the University of Illinois. He was concerned about rumors and allegations that the University of Iowa had violated NCAA rules in its recruitment of Thomas. There are no other facts before the Court which support any other contention. This failure on "an essential element of his case" dooms his Petition.

Thomas attempts to side-step the failure to create a record by asserting that he was manipulated by Pearl. These arguments were not asserted or supported before the district court and simply represent an attempt to belatedly manufacture a position which he was unable to support or did not support in his resistance to the motion for summary judgment. In short, Thomas did not properly raise and identify genuine issues of fact because he could not. His Petition to review this record should be denied.

D. Pearl did not violate 18 U.S.C. § 2511 because he acted under color of law.

18 U.S.C. § 2511 provides that it is not unlawful for a person acting under color of law to intercept a telephone communication where that person is a party to the communication. 18 U.S.C. § 2511(2)(c). An individual acts under color of law when he is clothed with the authority of the state and acting in the performance of his official duties. *See, Monroe v. Pape*, 365 U.S. 167, 184 (1961); *United States v. Classic*, 313 U.S. 299 (1941).

The undisputed facts demonstrate that Pearl was always acting within the scope of his employment as assistant basketball coach at the University of Iowa when he tape-recorded the conversation with Thomas. His job responsibilities at the University of Iowa included recruiting prospects for the University of Iowa basketball team. He had been involved in recruiting Thomas since December, 1988. During his frequent telephone conversations with Thomas, they discussed recruiting contacts which Thomas had received from other interested universities including the University of Illinois. Pearl believed that recruiting violations had been committed by the University of Illinois. Pearl had also heard rumors of allegations that he had violated NCAA rules as well. He discussed his concerns with his superiors, and he was directed to document his contacts with Thomas. He was provided with a tape-recorder with a telephone attachment to record statements concerning recruiting activities for Thomas.

On April 9, 1989 Pearl tape-recorded his telephone conversation with Thomas. During that telephone conversation Thomas referred to him as "coach." They discussed Thomas' desire to attend the University of Iowa. Pearl pointed out the advantages of attending the University of Iowa. The contents of the telephone conversation in question indisputably demonstrate that it was made by Pearl in connection with his attempts to recruit Thomas to attend the University of Iowa on a basketball scholarship.

Thomas concedes the point in his Complaint. He asserts Pearl acted "in his representative capacity as assistant basketball coach for the University of Iowa" as well as his individual capacity. The Complaint alleges that Pearl recorded telephone conversations "in his representative capacity as assistant basketball coach for the University of Iowa" and that he disclosed the contents of that conversation "in his representative capacity as assistant basketball coach at the University of Iowa." Thomas' counsel acknowledged that Pearl recorded his conversations while he was acting as assistant basketball coach.

> Acting in the scope of his employment as assistant basketball coach, he tape-recorded certain telephone conversations with my client, my client's family, acquaintances of my client and others.

(Defendant's Statement of Undisputed Fact and Affidavit of Doug Young). No other facts were offered.

Consistently, Thomas offered the wholly unsupported assertion that "self-imposed limitations by educational institutions, and perhaps universal limitations as to institutions in general," delimit "recruiting" and by that

definition, excludes Pearl. No evidence from other institutions was offered which would place tape-recording a telephone conversation with a recruit as being outside the scope of recruitment.

Similarly, the disclosure of the tape recording was also in the course of Pearl's employment as assistant basketball coach at the University of Iowa. NCAA Enforcement Officer Richard Hilliard came to the University of Iowa in June, 1989 and requested information that the University of Iowa might have concerning the recruitment of Thomas by the University of Illinois. This request was made as part of an NCAA investigation. Pearl allowed Mr. Hilliard to listen to the tape-recorded conversations at the direction of head coach Tom Davis. Mr. Hilliard returned to the University of Iowa during August, 1989 and requested that he be provided with the tape recordings. Again at the direction of Head Coach Tom Davis, Pearl provided the tape recording of the telephone conversations to Mr. Hilliard. The undisputed facts demonstrate Pearl was acting within the scope of his employment at all times. For this additional reason, his Petition must be dismissed.

CONCLUSION

This case presents no special and important reason to grant Certiorari.

The Seventh Circuit Court of Appeals properly upheld the district court's order granting Pearl's Motion for Summary Judgment. Thomas did not adequately generate genuine issues of fact in resistance to the Motion for

Summary Judgment and failed to preserve the issue of the proper interpretation of 18 U.S.C. § 2511 in the lower court. Pearl's Motion for Summary Judgment was properly granted. The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

BONNIE J. CAMPBELL
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Second Floor
Hoover State Office Building
Des Moines, IA 50319
(515) 281-8330

Attorneys for Respondent